

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

61-7

365

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,355

UNITED STATES OF AMERICA,
APPELLEE

v.

JAMES L. REYNOLDS,
APPELLANT

Appeal From The United States
District Court For The District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

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APPELLANT'S BRIEF

Question Presented

Is an in-Court identification by an eye witness so prejudicial to a defendant whose only defense is mistaken identity as to deny him due process of law where the initial identification

through photographs is unnecessarily suggestive?

THIS CASE HAS NOT PREVIOUSLY BEEN BEFORE THE COURT.

Statement of the Case

The Appellant was convicted on May 2, 1968, in the United States District Court for the District of Columbia of the offenses of entering a Savings and Loan Institution with intent to commit robbery (18 U.S.C. 2113(a)) and of robbery and assault with a dangerous weapon (22 D.C.C. 2901,502). On June 28, 1968, Appellant was sentenced to various terms of imprisonment on the several counts of which he was convicted, amounting to a general concurrent period of imprisonment of from five (5) to fifteen (15) years. Appellant is confined at Lorton Reformatory, Lorton, Virginia.

This case arose from the attempted robbery of the Alabama Avenue Branch of the National Bank of Washington about 8 A.M. on August 10, 1967, a Thursday.

On that morning the Head Teller (TR-2.38) ^{1/} met the parking

^{1/} The transcript of the trial is in two sets. The first set is in one volume by reporter Martha Jane Maloney and covers the proceedings of April 29, 1968. Citations to this set will be "TR-1". The second set is in three volumes by reporter Duane B. Duschaine and covers the proceedings of April 30, May 1 and May 2, 1968. Citations to this set will be "TR-2".

lot attendant (TR-2.39) and together they walked to the front where he unlocked the door. The Teller entered but upon hearing a commotion turned and saw a person push the attendant into the Bank saying "this is a hold up". Both were forced to lie on the floor (TR-2.41) and other people came into the Bank (TR-2.44). The hold up men caused the Teller to open the door and let in Mr. Albert (TR-2.48), Miss Plemmons (TR-2.49), both employees, and the Bank detective (Primrose)(TR-2.50,51) who was struck on the head and knocked to the floor. His gun was taken (TR-2.208). Mr. Brister, another employee, looked in the window (TR-2.51) and the robbers ran out the door (TR-2.52). The first hold up man's face was not covered (TR-2.40, 91, 159) but there were at least two others who were masked (TR-2,101). The Appellant was accused of being the first man while the others were never identified.

On August 29, 1967, Appellant had been arrested in Atlantic City, New Jersey, at which time he had in his possession the gun taken from Primrose (TR.2.24,25). On October 23, 1967, Mr. Primrose was taken to Police Headquarters in Washington, D.C. and shown some pictures after he was told a suspect had been arrested who had in his possession Primrose's gun (TR-2.204), and that the suspect's photo was among the group shown from which Primrose selected a photograph of Appellant (TR-2.183). Partially on this basis an arrest warrant was issued for Appellant

who was surrendered by his counsel to Detective Blancato on October 25, 1967 (TR-2.183). A preliminary hearing set for October 25, 1967, was continued to November 9, 1967 (TR-1.50). Prior to the hearing Detective Blancato had Primrose enter a room after telling him that the person who had been arrested and charged would be there (TR-1.107) and where he was sitting (TR-1.109). The Trial Court ruled the circumstances of the identification incident to the Commissioner's hearing were unnecessarily suggestive and for that reason were to be excluded (TR-2.203).

Summary of the Argument

Under the totality of the surrounding circumstances the identification procedure used with respect to the witness Primrose was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification and, therefore, Primrose being the principal witness, the entire proceeding was prejudicial and the conviction fatally tainted.

Argument

The Trial Identification of the Appellant by the Witness

Primrose Should Not Have Been Admitted in Evidence Because It Was
Predicated Upon Such Unnecessarily Suggestive Out-of-Court
Identification Conducive to Irreparable Mistaken Identification

as to Deny Him Due Process of Law.

Transcript References: TR-1, pp. 40-69, 92-113, 136-139, 151-154; TR-2, pp. 23-26, 38-52, 63-65, 90-105, 158-194, 199-225, 243-256, 345-349, 358-388, 420.

The testimony of the witness Primrose identifying the Appellant as the non-masked member of the abortive hold up team was vital prosecution evidence at the trial in the Court below.

It was error for the trial court to admit this evidence for the in-court identification was based upon unnecessarily suggestive out-of-court identification from photographs and a tainted and improper confrontation of the Appellant at the Court House just prior to the Hearing before the United States Commissioner on November 9, 1967. The procedure followed with respect to the witness Primrose so undermined the reliability of the eyewitness's identification as to violate due process, Foster v. State of California, ____ U.S. ____, 89 S. Ct. ____, 22 L.ed 2d 402 (1969).

The Appellant had solely the defense of alibi, i.e., that he was not present at the time when and the place where the offense was allegedly committed (TR-2.420). He so testified in his own behalf (TR-2.345-349, 364). There was a witness with Appellant at the time of the offense (TR-2.347,373). Appellant tried unsuccessfully to locate her (TR-2.378) but she was in

hiding (TR-2.387). The individual from whom Appellant secured the gun of Primrose (he readily admitted having it in his possession) was locked up (TR-2.378) serving a 22 year sentence (TR-2.388). These factors are an important part of the totality of the surrounding circumstances under which Appellant's claim must be evaluated. See Simmons v. United States, 390 U.S. 377 (1968).

As opposed to the unimpressive case Appellant was able to make owing to the unfortunate position he found himself in with respect to those who could have testified in support of his assertions (although the fact Appellant voluntarily went to the police when he learned he was being sought on another matter (TR-2.358,359) and the fact he took the stand should have enhanced his otherwise poor showing) is the identification in Court of Appellant by the witness Primrose. Obviously, Primrose was the principal witness against Appellant, the star of the show so to speak, the one most likely to gain the unobjective sympathy of the jurors and the one to whom they would pay the most attention.

The importance to the prosecution of Primrose's identification cannot be understated. Primrose was the only person seriously assaulted and the only one injured. His was the most positive of the identifications of the three witnesses (Primrose, McDonald and Milburn), from amongst all the witnesses, who assertedly

recognized Appellant. Furthermore, witness McDonald had only a glimpse of the hold up man (TR-2.63,65) while witness Milburn saw only a part of the hold up man's face (TR-2.90,93).

Bearing in mind that the prosecution's case hinged entirely upon the identification of Appellant as the would be hold up man while Appellant honestly, forth rightly and categorically testified he was in another place at the time, and that Primrose's testimony was by far the most important with respect to that identification, the undeniable suggestive out-of-court identification and confrontation takes on added significance.

Although the Trial Court ruled (TR-2.203) that the identification incident to the Commissioner's hearing was unduly suggestive and evidence based thereon was to be excluded, such identification was a part of the total circumstance and clearly would have added to, if it did not actually create, an irrepressible or unerasable impression upon the witness lasting through the trial.

Primrose's in-court identification was predicated upon and was allowed as a result of his selection of Appellant's photograph from a group shown him at Police Headquarters on October 23, 1967 (TR-1.95, TR-2.204). Officer Blancato told Primrose:

A. "He told me a suspect's photograph would be among the photographs he would show me and he would like for me to pick out the suspect."
(TR-1.95,96).

A. "He asked me to report to the Robbery Detail at the First Precinct for identification."
(TR-1.102).

Q. "He told you that some guy had been arrested in New Jersey that had your gun, did he not, sir?

A. "I believe so, I don't remember". (TR-1.103).

Q. "Now, when you went down to police headquarters to look at these pictures, you have been told, had you not, sir, by Mr. Blancato, the police officer, Sergeant Blancato, one of the police officers handling this case, that a person had been arrested.

A. "Yes, sir.

Q. "Who was in possession of your gun?

A. "Yes, sir.

Q. "You knew that, didn't you?

A. "Yes, sir." (TR-2.252,253).

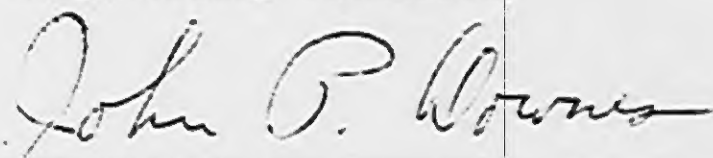
This advising of the witness that the suspect's photograph was among the group shown under the circumstances of this case was unduly suggestive and gave rise to a very substantial likelihood of irreparable misidentification, Simmons v. United States, supra, which when considered in the light of the totality of the circumstances in this case was so prejudicial to the defendant as to amount to the denial of due process within the standard sanctioned in Stovall v. Denno, 388 U.S. 293 (1967) and under the rule of United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967). Although these latter cases

presented the question of the right to counsel, their rule is applicable to all cases of tainted identification where the improper employment of photographs by police cause witnesses to err in their identification of criminals, Simmons v. United States, supra.

Conclusion

WHEREFORE, the Appellant moves this Honorable Court in its wisdom to reverse the judgment of the District Court in this case because of the prejudicial error committed in the trial of the case which deprived Appellant of his right to a fair trial.

Respectfully submitted,



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